

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

**IN RE ANDROGEL ANTITRUST  
LITIGATION (NO. II)**

**MASTER DKT. NO.  
1:09-MD-2084-TWT  
ALL CASES**

**DEFENDANTS' MEMORANDUM IN SUPPORT  
OF MOTION IN LIMINE NO. 2 TO PRECLUDE REFERENCE TO  
ABSENCE OF DEFENSE WITNESSES AT TRIAL**

Defendants move to preclude Plaintiffs from commenting on or otherwise referencing the absence of defense witnesses at trial.

### **LEGAL STANDARD**

“[E]vidence must be relevant to be admissible.” *Riddle v. Tarpley*, 2018 WL 8198019, at \*1 (N.D. Ga. Sept. 7, 2018); Fed. R. Evid. 402. But relevance alone does not ensure admissibility. Relevant evidence will still be excluded if its probative value is “substantially outweighed by a danger of ... unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. In this context, unfair prejudice is an “undue tendency to suggest decision on an improper basis.” *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014) (quoting advisory committee note).

### **ARGUMENT**

The Court should prohibit Plaintiffs, who have the burden of proof, from commenting at trial on the absence of defense witnesses. Such comments are unduly prejudicial and risk wrongly insinuating that Defendants are concealing information or somehow hindered Plaintiffs in gathering evidence—which is, of

course, untrue. *See, e.g.,* Ex. A<sup>1</sup>, Minute Order, *Turner v. Lockheed Shipbuilding Co.*, Case No. 2:13-CV-01747 (W.D. Wash. Nov. 22, 2013), ECF No. 196, at 4 (“No comment shall be made about the failure to call a witness without advance permission of the Court, which shall be sought outside the presence of the jury.”); *Whitehead ex rel. Whitehead v. K Mart Corp.*, 173 F. Supp. 2d 553, 561 (S.D. Miss. 2000) (“Plaintiffs’ counsel also asked the jury, ‘why didn’t we . . . see someone from the national company come into this courtroom and try to explain their conduct. This court . . . gave a curative instruction stating that a defendant has no obligation to produce any witnesses . . .”).

It would be particularly improper for Plaintiffs to refer to the absence of witnesses here, where they have taken the videotaped depositions of more than 35 fact witnesses, some more than once. To the extent consistent with the Rules of Evidence, Plaintiffs may play portions of those videos at trial. *See* Fed. R. Civ. P. 32(a)(1) & (4). As a result, arguments to the jury concerning the absence of defense witnesses ignore the extensive discovery Defendants have provided to Plaintiffs in this case. Accordingly, the Court should preclude such references under Rules 402 and 403.

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<sup>1</sup> All references to “Ex.” are exhibits attached to the Declaration of Rohit K. Singla filed concurrently herewith, unless otherwise noted.

## CONCLUSION

For the reasons discussed, Defendants respectfully request that the Court preclude Plaintiffs from commenting on or otherwise referencing the absence of defense witnesses at trial.

Respectfully submitted this 15th day of November 2019.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1D, counsel hereby certifies that the foregoing  
**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION IN LIMINE  
NO. 2 TO PRECLUDE REFERENCE TO ABSENCE OF DEFENSE  
WITNESSES AT TRIAL** has been prepared in accordance with Local Rule 5.1  
using Times New Roman 14 point font.

Respectfully submitted this 15th day of November 2019.

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